

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**HENNES & MAURITZ, LP D/B/A H&M**

**and**

**Cases 32–CA–250461  
32–CA–256051**

**UNITED FOR RESPECT**

*Jason P. Wong, Esq.*, for the General Counsel.  
*Michael G. Pedhirney, Esq. (Littler Mendelson P.C.)*  
for the Respondent Employer.

**DECISION**

**Statement of the Case**

**ARIEL L. SOTOLONGO**, Administrative Law Judge. At issue in this case is whether Respondent Hennes & Mauritz LP, d/b/a H&M (Respondent or H&M) unlawfully discharged its employee Nickolas Gallant (Gallant) because he engaged in protected concerted activity, and whether on various dates from May through August, 2019, Respondent engaged in unlawful coercive conduct towards its employee(s), including interrogations, threats, creating the impression of surveillance, and other similar conduct.<sup>1</sup>

**I. Procedural Background**

Based on charge, and amended charge, filed by United For Respect (UFR) in case 32–CA–250461 on October 21, 2019 and December 19, 2019, respectively, the Regional Director for Region 32 of the Board issued a complaint based on those charges on December 20, 2019.<sup>2</sup> Thereafter, after the filing of a charge in case 32–CA–256051 by UFR on February 10, 2020, the Regional Director issued an consolidated complaint on February 25, 2020, alleging that

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<sup>1</sup> In its complaint, the General Counsel had additionally alleged that Respondent had maintained certain rules in its employee handbook which were unlawful. By letter dated April 30, 2020, the General Counsel withdrew said allegations, which were contained in paragraph 6 of the complaint. I note that this does not affect paragraph 8 of the complaint, which alleges that Respondent unlawfully applied its work rules to restrict Section 7 activity.

<sup>2</sup> Although little testimony was proffered on the nature of UFR, it appears that it is a community-based organization that promotes employee interests, such as wage, hour and health and safety laws and regulations, as will be briefly discussed above in relation to the activities of alleged discriminatee Gallant. I note that UFR is not alleged in the complaint to be a labor organization within the meaning of Section 2(5) of the Act—nor is there a need to, as any party can file Board charges.

Respondent had violated Section 8(a)(1) of the Act by engaging in the conduct briefly described above. Respondent thereafter filed a timely answer to said complaint, in essence denying that it had acted unlawfully. I presided over a hearing in this case on March 9, 2020 in Oakland, California.

## II. Jurisdiction

The complaint alleges, and Respondent admits, that at all material times Respondent has been a corporation with places of business in Hayward, San Francisco, and Emeryville, California, where it is engaged in the retail sale of clothing and related products. The complaint further alleges, and Respondent admits, that in conducting its business operations described above, it has derived gross revenues in excess of \$500,000, and has purchased and received at its California stores goods valued in excess of \$5,000 directly from points outside California. Accordingly, the complaint alleges, Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

## III. Findings of Fact

### *A. Background Facts*

The facts discussed in this section are not in dispute, and indeed some are contained in exhibits that were introduced jointly by the parties. As briefly noted above, Respondent H&M is engaged in the retail clothing industry and operates numerous retail stores throughout the country and the world, including stores in San Francisco, Emeryville and Hayward, where events at issue herein occurred. Gallant worked as a sales advisor at various stores since 2016, the last one in Emeryville (store #145), where he was employed at the time he was discharged on August 27, 2019.<sup>3</sup> Nina Walters (Walters) was Respondent's District HR Manager until September 2019, and Elena Siantz (Siantz) was Respondent's Employee Relations Specialist (beginning in July 2019). Both were admitted by Respondent to be Section 2(13) agents of Respondent at the time of the events in question herein. Thomas Baugh (Baugh) was store manager at the Emeryville store where Gallant worked, and Hailey Hunter (Hunter) was a Department Manager at that store. Both were admitted being Section 2(11) supervisors and Section 2(13) agents of Respondent at the time of the events related to Gallant.<sup>4</sup>

It is undisputed that Respondent maintained and enforced certain rules with regards to its employees, contained in its "Support Book" under the headings of "Conflict of Interest" (COI) and "Non-Disclosure/Confidential Information" (NDCI), which were as follows:

<sup>3</sup> All dates hereafter shall be in calendar year 2019, unless otherwise specified.

<sup>4</sup> Additional individuals who were identified as managerial employees of Respondent in the record, and who directly or indirectly had a role in the events related to Gallant were: Chris Mikulski, Country Employee Relations Manager; Pamela Blanco, Labor Relations Supervisor; James Reed, Manager at store #101 (San Francisco Westfield Mall); and Andrew Mutchler, West Coast Regional HR Manager. While none of these individuals were alleged as Section 2(11) supervisors or Section 2(13) agents of Respondent in the complaint, there can be little doubt, given their positions, that they were either or both.

**Conflict of Interest**

All employees must avoid professional activities and relationships that conflict with H&M's interests or negatively affect H&M's reputation. The activities and relationships include, but not limited to:

- & Accepting, receiving or soliciting gifts, favors or services that may or appear to influence the employee's decisions or professional conduct.
- & Accepting, agreeing to accept or soliciting money or other tangible or intangible benefits in exchange for the employee's favorable decisions or actions pertaining to job performance.
- & Accepting employment or participating in a professional activity that may require disclosing H&M confidential Information.
- & Accepting work or conducting outside business with a competitor. State and local regulations apply.

Employees must inform their manager of actual or potential conflicts as soon as they are aware of them.

**Non-Disclosure/Confidential Information**

H&M expects all employees to use sound judgment to protect its confidential information. Confidential information can be considered as:

- & Personnel files and information
- & Shrink & Sales information and financial data
- & Methods of loss prevention
- & Pricing practices
- & Any information management
- & Advertised and unadvertised information defines as confidential

(J. Exh. 2)

Likewise, as discussed below, it is undisputed that Respondent maintains that Gallant was discharged because he allegedly violated these rules.<sup>5</sup> It is also undisputed that during the period from May through August, Gallant was engaged in protected concerted activity, discussed in more detail below, which the General Counsel alleges was the basis for Gallant's discharge.<sup>6</sup> For example, on at least two occasions in late May and or early June, Gallant spoke to employees at the H&M store at the Westfield Mall in San Francisco (store #101), which Gallant visited, about problems employees were having with their working conditions. The conditions that Gallant discussed with the employees included employees allegedly having to work, for several hours, while fire alarms were going off, employees not receiving sufficient bathroom breaks despite their medical condition(s), and bereavement leave. Gallant also explained to them the "Fair Workweek" policies that were in effect for the city of San Francisco, as well as other

<sup>5</sup> Thus, there is no dispute that this is what Respondent asserts was its reason to discharge Gallant, although the General Counsel believes otherwise and has so alleged.

<sup>6</sup> In this regard I note that in its post-hearing brief, Respondent concedes that Gallant had been engaged in protected concerted activity, although it disputes that this was the basis for his discharge. (See, Respondent's post-hearing brief, p. 38)

nearby localities.<sup>7</sup> Gallant testified that he was observed during his visits by managers at the store while he spoke to the employees, who were on break. Gallant engaged in additional protected concerted activity subsequently, prior to his discharge, as discussed below. Finally, there is no dispute that Respondent discharged Gallant on August 27, although the General Counsel and Respondent differ on the reason or motivation for his discharge.<sup>8</sup>

### *B. The Events at the Hayward Store*

There is no dispute that in late May or early June, Gallant was asked by Respondent to attend and participate in an “assessment center,” where employees are assessed for potential supervisory or managerial positions, at its store at the Southland Mall in Hayward, California. In addition to Gallant and several other employees, also in attendance at the assessment center on this occasion was Nina Walters (Walters), Respondent’s District HR Manager at the time. Gallant testified that after the training session ended, as they were leaving the breakroom where the training was conducted, Walters approached him and said, “we need to talk,” and led him into a vacant manager’s office. Upon arriving at the office, Walters said to Gallant “you have been visiting our San Francisco store(s),” at which time Gallant admitted that he had. He explained that he had been there to look at the fire alarm situation as well as a situation involving a locked door which (apparently) should be open at all times, for safety reasons. According to Gallant, Walters asked him why he was doing this, adding that this was her job, not his. She also said to him that he should not be talking to employees about policies he wasn’t aware of or had any knowledge about. Gallant then told Walters that he had an “internship” and was doing “Fair Workweek” outreach in San Francisco and was talking to workers about violations and conducting surveys of customers regarding the doors being locked. According to Gallant, Walter then asked “Internship? What’s that?” Gallant replied that he was an advocate for “Fair Workweek.” Gallant then told Walters that five employees at the San Francisco store wanted to quit because of favoritism and that they deserved a “committee.” According to Gallant, when he used the word “committee,” Walter’s voice and demeanor changed, now becoming “serious.” She then asked who the five employees (who wanted to quit) were and asked Gallant what type of question he was asking and asked if he had copies of the “surveys.” Gallant told Walters he had no copies of any surveys, as his questions were all verbal, and that he asked customers how they felt. He also told her that he had been informed that the air conditioning at store #80 was broken, and that employees were uncomfortable, and that he had spoken to both employees and customers about that situation. Walters told Gallant that she would follow up with him regarding his “internship,” and asked again who the five employees were who wanted to quit.

As would be expected, Walters’ depiction of this encounter is somewhat different than Gallant’s, even though she did acknowledge discussing some of the topics mentioned by Gallant. Perhaps the most salient distinction in her account is that Walters testified that it was Gallant who called her aside after the training session was over, telling her he wanted to talk to her. She then led Gallant to a vacant office nearby, although she did not know at the time what Gallant

<sup>7</sup> “Fair Workweek” ordinances require local employers to abide by certain standards with regard to employees’ hours and work schedules.

<sup>8</sup> The complaint alleges that Respondent discharged Gallant on August 17, and in its post-hearing brief (P. 11) Respondent suggests that this occurred on August 22, but the records introduced into evidence clearly show this occurred on August 27, as testified to by Gallant (Tr. 76–77; Jt. Exh. 4; R. Exh. 4).

wanted to talk about.<sup>9</sup> According to Walters, once at the office, Gallant said he wanted to discuss the events at store #101 in San Francisco. Gallant brought up the problem with fire alarm, telling her he had discussed the situation with his peers at the store. Walters testified that she asked him how his peers felt, because she wanted to find some kind of resolution to the problem. At that point, according to Walters, Gallant said that he had an “internship,” also mentioning that he was in law school, adding that he had been “surveying the stores within the market, to gather information.” Walters did not recall much else about the conversation, but she specifically denied telling Gallant that it wasn’t within his job description to talk to other employees. She also denied asking Gallant to provide copies of the surveys he had taken, or asking him to identify the employees with whom he had spoken about workplace concerns, or to identify the employees who claimed to have been victims of favoritism,<sup>10</sup> and further denied that Gallant had said anything about a work committee.

Regarding Gallant and Walters’ conversation at the Hayward store, as described above, I credit Gallant’s version as being more credible and reliable, for several reasons. First, from the very start, I believe it far more plausible and likely that it was Walters who asked to speak with Gallant at the end of the training session, rather than the other way around. The very fact that Walters led him to an office, where they could speak in private, indicates that she wanted their conversation to remain between themselves. It makes little sense that Walters would lead Gallant to the vacant office, before she had any idea of what he was going to say, had Gallant been the one who initiated their encounter. Indeed, Walters admitted that she had been informed about Gallant’s visits to the San Francisco store, which makes it more likely that she wanted to find out about the reason for his visit(s), and would therefore have initiated their conversation.<sup>11</sup> Second, Gallant’s version of their conversation was far more detailed, whereas Walters admitted not recalling a number of things about the conversation—and many of the things she did recall dovetailed with Gallant’s version, though she specifically denied having said some of the things Gallant claimed. Finally, I note that Gallant freely admitted having initiated subsequent contacts with Walters, as discussed below, which makes his testimony that this instance was initiated by Walters more credible. Accordingly, I credit Gallant’s version of their conversation and find that it occurred in the manner he described.

### *C. Gallant Revisits the San Francisco Store and Respondent’s Reaction*

On June 13, Gallant again visited store #101 in San Francisco, and spoke to employee Elsa Soronia about the working conditions in the store, including the fire alarm situation, the locked doors situation, and the hiring of new employees despite reduced hours for current employees. Gallant checked the doors at the kids’ department and verified that they were still

<sup>9</sup> Initially, Walters’ testimony suggested that Gallant had told her, up-front, that he wanted to talk to her about events at store #101 in San Francisco, and then she led him to the vacant managers’ office (Tr. 126). She later clarified, however, that she wasn’t aware of what Gallant wanted to talk to her about, and that it wasn’t until they reached the office that Gallant mentioned the events at store #101 in San Francisco (Tr. 153–154)

<sup>10</sup> I would note, however, that Walters also testified she did not recall if Gallant had said anything about employees complaining about favoritism (Tr. 128)

<sup>11</sup> I would note that the Emeryville store, where Gallant worked, is near Oakland/Berkeley and across the Bay from San Francisco, about 10 miles away. Certainly, it is reasonable to infer that management would be curious as to why an employee from that store would come such a long way to meet with the employees at the San Francisco store.

locked. He asked Supervisor Ching Lam to unlock the door(s), but Lam replied that he was too busy. Gallant then went to complain to the Mall security office about the locked doors, and security personnel accompanied Gallant back to the store, where they met with Store Manager James Reed. The security guard informed Reed that they had received a complaint about the  
 5 locked doors, which was in possible violation of OSHA regulations, and asked Reed to unlock the door(s). Reed asked Gallant why he was doing this and told him that he was causing a disturbance and making “us” (H&M) look bad. Gallant replied, “you are putting us in danger.” Reed unlocked the doors in question. Gallant testified that he then phoned Walters and left a message in her voice mail detailing what had just occurred. A short while later, Walters called  
 10 Gallant back, and told him he had received his message and would take care of these matters. Gallant asked Walters if she could meet with him, but she declined, stating that she was too busy.

Walters confirmed that Gallant had phoned her and confirmed the essence of their conversation when she called him back. On that same date, Reed sent Walters an email,  
 15 complaining to her about Gallant’s visit and actions, including calling Mall management, and describing Gallant’s conduct as “disruptive.” (GC Exh. 9). That same afternoon, Walters emailed Chris Mikulski, Respondent’s Country (U.S.) Employee Relations Manager, to report on Gallant’s actions. Her email to Mikulski, which attached Reed’s email to her, states, in relevant part, as follows:

[H]e has an internship with a workers coalition (name he will not disclose) in which Nick essentially “audits” retailers in San Francisco, including H&M in which he is employed. Nick has been seen in multiple stores throughout the city in BOH reviewing staff  
 20 schedules, legal postings, consistency of policies from store to store/employee to employee, store safety & even fielding employee relation issues. Whereas this is an  
 25 AWESOME second set of eyes to have and I appreciate the intent, some of the managers in these locations are feeling as though he is interrupting business and causing issues instead of resolving them. He also may not have the training or all the information available to him as a FTSA to say what the brand is or is not doing in regard to those  
 30 issues... (GC Exh. 9)

Later that afternoon, Mikulski replied via email to Walters, stating: “I was not aware of this concern. I’ll give you a buzz tomorrow because I have serious concerns with the conflict of  
 35 interest this creates” (GC Exh. 10).

#### *D. The Meeting on July 18*

On July 18, Gallant was called to a meeting at the store in Emeryville where he worked. Present for the meeting, in person, was Hailey Hunter, a department manager at the store, and  
 40 Walters, who connected with them via phone. According to Gallant’s testimony, Walters told him that now that he had informed them of his internship, they needed to get some insight on it, because they were concerned he might be violating Respondent’s conflict of interest policy. Gallant replied that he was an advocate for the “Fair Workweek” policy, which he and others were trying to get implemented statewide. Walters told Gallant that “it” (the internship) might  
 45 be violating the conflict of interest policy by disclosing confidential information. According to Gallant, by “confidential information” Walters was referring to such things as sales reports,

“shrink percentage,” and internal move reports with visuals.<sup>12</sup> Walters then questioned Gallant about the surveys he had taken, wanting to know what they were all about. Gallant told Walters that he had already explained this before. He mentioned that he had done “surveys” of employees and customers at store #80, when the air conditioner had broken down, as to how they felt, and mentioned that he had filed complaints with OSHA. Walters informed Gallant that such actions were outside his role as a sales advisor, that there was a chain of command to be followed, and stated that employees he had spoken with could receive a “documentation” in their files, which Gallant interpreted as a “coaching” or “occurrence” that could lead to discipline. Walters pressed Gallant as to what he had discussed with employees of other retailers, and Gallant explained that as an advocate for “Fair Workweek” he explained to employees of other retailers what their rights were and how to file complaints with the city. He also told Walters, for example, that he informed these employees that one of the most common violations he had “collected” was regarding employers who hired new staff without first asking existing employees if they wished to work additional hours, which he said was in violation of the Fair Workweek policies. Walters informed Gallant that sharing this information with others was in violation of Respondent’s conflict of interest policy, because he was “leaking” confidential or internal information. Gallant denied that he was disclosing any confidential information, claiming that what he discussed was public information.<sup>13</sup> Walters responded that what he was doing was damaging H&M’s brand, in that he was making the company look negative because they were not following policy. According to Gallant, Walters insisted to know what type of questions Gallant was asking, which employees he was talking to, and what the nature of the internship was. She wanted copies of the surveys he was conducting and wanted to know his (internship) supervisor’s name. Gallant told Walters he would try to get her this information (via email) in the next few days, even though he felt it was not right. Gallant asked Walters if she knew the name of the union which represented H&M’s employees in New York City, and Walters said she did not know, but could follow up about that later.

Walters also testified about her July 18 meeting with Gallant and Hunter, which she conducted over the phone. Sometime prior to the meeting, according to Walters, she had phone discussions with both Mikulski and Elena Siantz, Respondent’s Employee Relations Specialist for the West Coast HR. Walters had informed them that Gallant was taking surveys from employees and customers and was involved in an internship for some other organization. She acknowledged not having any details that she could provide as to what exactly was being disclosed or not and, discussed what steps should be taken to get some clarity on what kind of information Gallant was gathering. They had concerns that the information Gallant had provided was vague in nature. What was being shared? Employee schedules, sales information? Thus, Walters testified, the “impetus” for the July 18 meeting with Gallant was to follow up on the nature of his internship, to get more details and information on what exactly he was “providing”

<sup>12</sup> “Shrink percentage” refers to loss reports due to thefts, and move reports apparently have to do with merchandise presentation designs. Gallant was adamant about the fact that he did not disclose any of such information, or any confidential information of any kind. He thus testified that the only subjects he discussed with other employees, whether employees of H&M or other retailers, were Fair Workweek and OSHA policies (Tr. 61–62).

<sup>13</sup> In that respect, Gallant testified that he spoke to fellow employees at H&M about their working conditions, talked to customers about how they felt about such things as locked doors (and lack of air conditioning), and had spoken to employees of other employers about their working conditions and working conditions at H&M (Tr. 101; 103).

in these surveys, and to remind Gallant of Respondent’s conflict of interest policy.<sup>14</sup> During the meeting on July 18, Walters testified, they went over the conflict of interest policy, and asked Gallant whether he was sharing information with other retailers. They inquired what did the internship require him to share. According to Walters, Gallant’s reaction was one of concern and hesitation, although he did agree to provide more information about the rules and responsibilities of his internship. She denied saying anything about any potential damage to the H&M brand and denied asking Gallant anything about the type of questions he was asking H&M employees or others as part of his surveys. She admitted asking Gallant about his role and responsibilities in the internship, and about the nature of the information being shared. Walters did not recall whether Gallant had mentioned that he was not getting paid for his internship, or whether he mentioned that his internship involved working on employee health & safety issues, or whether he mentioned OSHA or Fair Workweek regulations.<sup>15</sup> Walters admitted that she did ask Gallant to submit written documentation about his internship, including any documents needed to explain his role there.

Hunter, who was present in person at the store with Gallant during the July 18 meeting, did not testify, but her contemporaneous notes taken during the meeting were introduced into evidence (GC Exh. 2). These notes, which are three pages long written in longhand, to a significant degree corroborate Gallant’s testimony about what occurred during the meeting. Thus, the notes reflect that Gallant stated that the purpose of his internship was to ensure that every work environment was safe, and Walters informing Gallant that his conduct was in violation of Respondent’s conflict of interest rules, which were shown to him. The notes also reflect, inter alia, the following:

- Gallant mentioned the lock door(s) situation at store #101 and broken A/C at store #80 and his discussing these situations with employees and customers; Walters telling Gallant these issues were outside of his role—and that discussing this information and asking customers put H&M’s reputation at risk, and that sales advisors were not trained in leadership;
- Walters telling Gallant that personal information cannot be shared; that “any info that managers describe as confidential” is in policy; that the internship has ability to disclose personal info about the business, and that reputation is at risk because of disclosing information;
- Walters said she needed written role of internship description for approval, that Gallant was not being straightforward with internship description, and that more information was needed about the internship in order to investigate with employee relationships;
- Gallant said that he is working with OSHA to canvas for fair workplace law, and that he was not getting paid for this work; Walters reiterated that he is identified as an

<sup>14</sup> I note, however, that Walters also admitted that the purpose of the July 18 meeting was to find out what information was being “gathered.” (Tr. 158–159)

<sup>15</sup> I would note, however, that Walters admitted that during their conversation at the Hayward store about a month earlier, Gallant had informed her that part of his internship responsibilities was to ensure that workplace laws were enforced and “something to the nature” that he was an advocate for Fair Workweek, although she could not recall the specific law that Gallant mentioned (Tr. 154).



H&M employee while speaking to outside law firms, and that he is disclosing scheduling and financial info which is violating the policy;<sup>16</sup>

- Walters informed Gallant that he need not disclose info on all roles, only ones in relationship with H&M, OSHA and competitors; the written information they requested could be delivered via email or in person to store management, and that the info needs to come from an internship supervisor; Galant explained that he talks to other brand employees off the clock, which is within his rights, and talks about offering new hires hours before existing employees;
- Gallant asked Walters for information about the East Coast union, and Walters replied she did not know; Gallant also asked to discuss California labor laws and H&M policies, and Walters informed him that labor laws were already incorporated into the policies.

In light of the above, I find that Gallant’s testimony about what occurred during the July 18 meeting is more accurate and reliable than Walter’s version. Although their testimony overlaps to some degree, Gallant provided a far more detailed version of the July 18 events, and his version is corroborated to a greater degree by Hunter’s contemporaneous notes, which confirm details that Walters did not recall. Additionally, I note that on July 19 Gallant filed a written “occurrence” regarding the July 18 meeting contained in his personnel records, where he confirms many of the details he later testified about (GC Exh. 3).<sup>17</sup> Accordingly, I credit Gallant’s testimony over that of Walters regarding the July 18 meeting, to the extent that they conflict. It should also be noted that Gallant had a change of heart and never turned over any written information regarding his internship to Walters or others following the July 18 meeting.

#### *E. The August 14 Conversation between Gallant and Siantz and its Aftermath*

Following the July 18 meeting described above, Walters sent an email to Mikulski, Siantz and Jose Henriques, her upper-echelon HR counterparts at the national and regional levels, briefly describing the July 18 meeting with Gallant. In this email, Walters in essence requests that the Gallant matter be handled by them going forward. Indeed, the evidence suggests that Walters played no direct role in the events that followed, including Gallant’s discharge, since she turned these matters over to her counterparts, including Siantz.

On August 14, Gallant received a phone call from Siantz at the Emeryville store where he was working. Siantz informed Gallant that they had never received the information that Walters had requested during the July 18 meeting and that this call was a follow-up. Gallant testified that he told Siantz he did not feel it was right for him to provide this information, that he was improving working conditions and was protected by the NLRB. He asked Siantz to provide him with a written form that showed the “legality” of what she was requesting. According to Gallant, Siantz then asked how she could submit such form, whether by mail or email, and Gallant replied that she could send it to Tom his store manager, and that Tom could serve him. Gallant testified that he never received anything from Siantz. Siantz’s testimony about their August 14

<sup>16</sup> It is notable, however, that Walters specifically admitted during her testimony that Respondent had no evidence that Gallant had disclosed (or “leaked”) any confidential information (Tr. 166).

<sup>17</sup> I note that in this filing, among other things, Gallant vehemently denies the accusation that he had spread (or disclosed) and “confidential” information, an accusation he calls “totally false.” (GC Exh. 3)

conversation dovetails with Gallant’s. She testified that she asked Gallant for a “role description” of the internship and for additional information about the points that were being audited and requested a time frame when these could be provided. She confirmed that Gallant requested papers explaining the legality of what they were requesting and why it was needed, but she said she was not a lawyer and could not supply this information. Following their phone call, Siantz wrote a form documenting her phone exchange with Gallant, which confirms the substance of what is described above (GC Exh. 4).<sup>18</sup>

Siantz further testified that following her phone conversation with Gallant on August 14, she consulted with Mikulski about what their next steps should be regarding Gallant. According to Siantz, she and Mikulski jointly decided to recommend that Gallant be terminated. The reason, Siantz explained, was that they did not have the information requested from Gallant, and that “it was unclear as to who the information that was being audited and any information therein” (Tr. 180). Regarding this vague, quizzical reason for recommending termination, Siantz was asked, during cross-examination, if Walters had ever informed her that Gallant was releasing confidential information, Siantz replied: “No. I don’t know.” Asked if they had any evidence that Gallant was releasing confidential information, Siantz replied: “We didn’t know where the information he was collecting was going” (Tr. 189–190).<sup>19</sup> I conclude that this is an admission, albeit an evasive one, that indeed, as Walters had earlier admitted, Respondent had no evidence that Gallant had in fact disclosed any confidential information.

On August 16, Siantz emailed Blanco, informing her that they would be proceeding to terminate Gallant and that (Emeryville) Store Manager Tom Baugh would be tasked with carrying out the termination, which would be based on Gallant’s violation of Respondent’s Conflict of Interest policy (R. Exh. 3).

#### *F. Gallant’s Termination on August 27*

On August 27, Gallant was called to a meeting with Emeryville Store Manager Tom Baugh and Department Manager Carmina Diaz. Baugh informed Gallant that this was his last day at work, and read him the termination notice, introduced into evidence jointly by the General Counsel and Respondent (Jt. Exh. 4). The termination notice states, inter alia, that he was being terminated for violating the company’s conflict of interest policy. The notice also briefly recounts Gallant’s meetings with Walters on July 18 and Siantz on August 14, and notes that due to Gallant’s failure to provide the requested information regarding the “potential” conflict of interest, the company was forced to terminate him. Separately, Baugh also prepared a “Security Termination Checklist,” and a “H&M Employee Termination Form,” which Gallant was not privy to (R. Exh. 4). In the Termination Form, which unlike the one read to Gallant was

<sup>18</sup> Prior to her phone call with Gallant, Siantz had emailed Pamela Blanco, Respondent’s US HR representative, attaching Walter’s July 18 email to her and others, and informing Blanco that she would keep her posted of her planned conversation with Gallant that day (GC Exh. 6)

<sup>19</sup> Siantz also testified that she did not know, at the time that she had her phone conversation with Gallant on August 14, that he had been advocating for Fair Workweek laws, or working on health and safety issues with employees, or that he was partnering with OSHA. I do not find this credible, as Walters had specifically mentioned that Gallant was engaged in these activities on her email dated July 18 addressed to Siantz and Mikulski (GC Exh. 6/p. 2). Additionally, Walters had earlier disclosed much of this same information to Mikulski on an email dated June 13 (GC Exh. 10)

typewritten, it states that the termination reason was “Violation of Company Policy,” and on a separate box explains that Gallant “violated the companies (sic) conflict of interest policy by discussing confidential H&M information with employees of other brands.” It is notable that Respondent never articulated exactly what confidential information Gallant had disclosed, perhaps because, as both Walters and Siantz admitted, Respondent had no such evidence.

Following his meeting with Baugh and Diaz, Gallant was escorted out of the store. As he was leaving, Gallant made a comment that he would “whistle blow” and leak info about the violations that were happening.<sup>20</sup>

#### IV. Analysis

##### *A. The Allegations Regarding the Events at the Hayward Store*

In the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act in May or June 2019 by creating the impression that it was engaged in surveillance of its employee(s)’ protected activities, by interrogating employee(s) about their protected activities, and by prohibiting employees from discussing their working conditions.<sup>21</sup> Respondent, both in its answer to the complaint and in its post-hearing brief, denies that it engaged in this conduct, or that the conduct it engaged in was unlawful.

As discussed above in the Facts section, I find that in late May or early June, a meeting took place between Gallant and Walters at its Hayward store, after the “assessment center” session ended. I credit Gallant’s version of the event and conclude that Walters asked Gallant aside and took him into a (vacant) supervisor’s office, where their conversation took place. I also find that during their conversation Walters did as follows:

- Told Gallant that she was aware he had been visiting the San Francisco store(s);
- After Gallant reported that he had been looking into the fire alarm and locked door(s) situation, she asked him why he was doing that;
- Told him it was not his job to do so, and that he should not be talking to other employees about policies he had no knowledge about;
- After Gallant mentioned that he was involved in an “internship,” Walters asked him what that was;
- Asked Gallant who the 5 employees were who had informed him they wanted to quit;
- Asked Gallant what kind of questions he was asking in his surveys and asked for a copy of such surveys.

The test of whether an employer has unlawfully created the impression of surveillance is an objective one, that is, whether under all the circumstances an employee could reasonably conclude from the statement or conduct in question that his/her protected activities had been placed under surveillance. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007),

<sup>20</sup> Diaz, who escorted Gallant out of the store, wrote a memo indicating that Gallant had said he was going to leak information about the incident at store #101, and that things were going to blow up and people were going to come to the store to check upon things (R. Exh. 5)

<sup>21</sup> Complaint paragraph 5(a) (i through vi)

quoting *Flexsteel Industries*, 311 NLRB 257, 257 (1993); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004). Thus, when an employer tells employees that it is aware of their protected activities, but fails to identify the source of this information, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred. *Conley Trucking*, 349 NLRB 308, 315 (2007). In the above-described circumstances, I find that Gallant could have reasonably concluded that his conversations with employees at the San Francisco store(s) were under surveillance. Accordingly, I conclude that Walter’s remark that she was aware that he had been visiting the San Francisco store(s) violated Section 8(a)(1) of the Act.

In determining whether an unlawful interrogation has occurred, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act. Relevant factors in that determination include: the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee’s reply to the questioning. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000). In applying the above factors to the facts at hand, I note that Walters held a fairly elevated position as a district manager, and conducted the meeting at a supervisor’s office, albeit a vacant one, and that her questions were insistent, numerous and accompanied by other coercive statements, as described above and below. Accordingly, by asking Gallant why he was looking into the fire alarm and locked doors situation, and asking who the employees he had spoken to were, and by asking him what kind of questions he was asking in his surveys (and asking him to provide a copy), I conclude Walters engaged in coercive interrogations in violation of Section 8(a)(1) of the Act. On the other hand, I do not believe that Walters’ asking of Gallant what he meant by an “internship” constituted an unlawful interrogation. In that regard I note that Gallant was very vague and circumspect when he mentioned his involvement in an “internship,” which elicited the response: “Internship? What’s that?” Walters might just as well have responded “Huh?,” which is in essence what she did, not having the vaguest clue—at the time—as to what Gallant was referring to, and certainly not knowing that it involved protected activity.<sup>22</sup> In such circumstances, I do not believe it was reasonable for Gallant to have felt coerced when asked what the heck he was talking about. Once Gallant elaborated, and Walters realized the internship was in a “workers coalition” (as she described it in her June 13 email—GC Exh. 9), involved in investigating working conditions, did further interrogation become coercive.

Finally, the test as to whether other statements, aside from interrogations, are unlawful under Section 8(a)(1) of the Act, is whether such statement(s) can reasonably be said to interfere with the free exercise of employee rights under the Act, by being threatening or otherwise coercive. If an employee could reasonably interpret or construct a statement as coercive, it matters not what the intent of the speaker was, or whether another reasonable construct of the statement is possible. *Double D Construction Group*, 339 NLRB 303, 303–304 (2003); *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995), *enfd.* 101 F.3d 1243 (8th Cir. 1996); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). During the above described

<sup>22</sup> Indeed, I cannot help but wonder, if in fact Walters’ reaction had been to say “Huh?” whether the General Counsel would have alleged *that* to be an unlawful interrogation.

conversation, Walters told Gallant that it was not his job to be doing the things he was doing, but rather hers, and that he should not be talking to other employees about things he didn't know about. I find these statements are coercive, because in essence it informs Gallant that he should not engage in protected activity and implies that disciplinary action could be taken should he persist. Accordingly, I find that Respondent violated Section 8(a)(1) as alleged.

*B. The Allegations Regarding the July 18 Meeting at the Emeryville Store*

As described in the Facts section, on July 18, Gallant was called to a meeting at the Emeryville store where he worked, attended in person by Department Manager Hunter and by Walters, who was speaking with them via phone. I credited Gallant's version of what occurred at this meeting, and indeed his testimony was corroborated to a large degree by Hunter's contemporaneous notes (GC Exh. 2). During this meeting, Walters repeated and doubled down on some of the same conduct she had earlier engaged in at the Hayward store, discussed above, which I have concluded was coercive and accordingly unlawful. Thus, for example, Walters interrogated Gallant about the nature of his internship—which by now she knew involved working in a “workers coalition that promoted employee rights—and further asked him to produce copies of the “surveys” he had engaged in. She again interrogated him about his conversation with fellow employees at H&M as well as his conversations with employees of other retailers, and again informed him that his discussion with fellow employees were “outside of his function” (meaning they were none of his business), which I earlier found to be unlawfully threatening. Walters, however, went further than she had at the earlier meeting in Hayward. Thus, she told Gallant that employees with whom he had spoken could receive written “occurrences” in their files, which Gallant reasonably interpreted as suggesting disciplinary action. She also told Gallant that his actions constituted a breach of Respondent's conflict of interest policy, inasmuch he had allegedly disclosed confidential information, although she never specified what such information was.<sup>23</sup> Additionally, Walters told Gallant that his activities were harmful to the H&M brand, and making the company look bad, and persisted in having Gallant disclose more details about his internship, which she requested in writing, including the identity of his “supervisor.”

Accordingly, I conclude Respondent violated Section 8(a)(1) of the Act during the July meeting with Gallant, as alleged in paragraph 5(b)(i) through (xiii), by:

- Threatening unspecified reprisals by informing Gallant that his conduct violated its Conflict of Interests policy, or might tarnish Respondent's brand;
- Repeatedly interrogating Gallant about his protected concerted activities in different ways, including directing him to produce written copies of surveys he had conducted, and to provide the name of his internship supervisor;

<sup>23</sup> This is particularly notable, as Walters admitted during her testimony that Respondent did not have any evidence that Gallant had in fact disclosed any confidential information. It is evident that she and her fellow managers were concerned that Gallant *might* do so, hence their repeated insistence that he provide abundant information about his internship and related activities. The bottom line, however, as discussed below, is that the record is entirely devoid of evidence that Gallant disclosed any confidential information, or that his activities somehow represented a conflict of interest, as defined by Respondent's rules.

- Prohibiting Gallant from discussing working conditions with other employees, whether Respondent’s or other employers’;
- Requiring Gallant to obtain written permission to participate in his internship.

5 *C. The Allegations Regarding the August 14 Meeting between Gallant and Siantz*<sup>24</sup>

As described above in the Facts section, I found that on August 14, Siantz phoned Gallant at the Emeryville store. She informed Gallant that they had not received the information Walters had directed him to produce earlier (on July 18), and that this was a follow-up request that he do so. Gallant declined, informing Siantz that his conduct was protected by the NLRB and that he was not obligated to produce the information Respondent had demanded. As described above, Gallant’s refusal to provide this information led to his termination a few days later.

Siantz’s conduct on August 14 mirrored and repeated Walter’s earlier conduct, which I have found to be unlawful. Accordingly, I conclude that on August 14, Siantz unlawfully interrogated Gallant by directing him to produce the information regarding his internship and violated Section 8(a)(1) of the Act.

20 *D. Gallant’s Discharge*

As briefly discussed above, there is no dispute that Respondent discharged Gallant on August 27, and that the reason given by Respondent for his discharge was his violation of its “Conflict of Interest” policy because he had ostensibly disclosed “confidential information.”<sup>25</sup> There is also no dispute that Gallant was engaged in protected concerted activity in the period preceding his discharge, and indeed Respondent concedes the point.<sup>26</sup> Moreover, it is clear and undisputable from the sequence of events described in the Facts section that Gallant was discharged for conduct—or misconduct—he allegedly engaged in while in the course of that protected activity.

The General Counsel espouses 3 alternate theories in support of its allegation that Gallant’s discharge was unlawful. First, it argues that under the Board’s rule in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 4–5 (2017), Gallant was discharged under a (presumably valid) rule that was applied to interfere with protected rights. He thus argues, citing *KHRG Employer, LLC*, 366 NLRB No. 22, slip op. at 2 (2018), that even if the rule was lawful, Gallant was engaged in protected activity and did nothing that was egregious enough so as to lose the Act’s protection.<sup>27</sup> Secondly, the General Counsel alternately argues that Gallant’s discharge was

<sup>24</sup> Complaint paragraph 5(c).

<sup>25</sup> See, GC Exh. 12 (email dated August 21 directing Store Manager Baugh to terminate Gallant).

<sup>26</sup> See, Respondent’s post-hearing brief, p. 38. Clearly, there can be no doubt that Gallant’s conduct in discussing working conditions with his fellow employees, as well as employees of other employers, and his discussing with them their rights under “Fair Workweek” and OSHA regulations, is protected activity.

<sup>27</sup> In so arguing, the General Counsel seems to be putting the cart before the horse. Thus, what the General Counsel appears to be arguing, as alleged in paragraph 8 of the complaint, is that the rule under which Gallant was discharged was applied unlawfully, because it was used to restrict Section 7 activity. Such conduct, however, falls under the analytical framework discussed in the third prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), a prong left untouched by *Boeing*. See, *Maine Coast Regional Health Services*, 369 NLRB No. 51, slip op at 2 fn. 5 (2019). Thus, *Boeing* is inapplicable in this case. Nonetheless, although *Lutheran Heritage* appears to be

unlawful because it had its genesis in the unlawful interrogations he was subjected to, and his failure to provide the information sought in those unlawful interrogations. Finally, the General Counsel additionally argues that Gallant’s discharge was unlawful under a *Wright Line* analysis.<sup>28</sup> Thus, it argues that it established that Gallant’s protected activity was a motivating factor in his discharge, and that Respondent then failed to meet its burden to show that it would have discharged Gallant even in the absence of such protected activity.

Respondent, on the other hand, relying solely on a *Wright Line* analysis, argues that the General Counsel failed to meet its burden because it did not establish a causal link between Gallant’s protected activity and his discharge, including the fact that there was no evidence of animus or disparate treatment.

For the reasons discussed below, I conclude that Gallant’s discharge was unlawful, but not under the analytical framework discussed by the parties, both of whom missed their mark.<sup>29</sup> Rather, I conclude that the facts of this case place it squarely within the analytical framework of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Under *Burnup & Sims*, the General Counsel must first establish that the discharged employee was engaged in protected activity, and that the alleged “misconduct” for which that employee was discharged occurred during the course of such protected activity. Thus, if such alleged misconduct is part of the *res gestae* of the employees’ protected activity, the employer’s motive is not at issue—and therefore *Wright Line* is not the proper analytical framework, contrary to what the General Counsel and Respondent suggested. Once the General Counsel meets this burden, the burden switches to the employer to show that it had a good faith belief that the employee engaged in misconduct in the course of his protected activity. If this burden is satisfied, the burden moves back to the General Counsel to establish that the misconduct did not, in fact occur. If the General Counsel is successful, the discharge is unlawful under *Burnup & Sims*.

As discussed above, it is clear, and undisputed, that Gallant was engaged in protected activity. It is also clear that it was his alleged misconduct, during the course of such protected activity, that led to his discharge. Thus, Respondent accused Gallant of violating its “Conflict of Interest” policy because he was allegedly involved in “accepting employment or participating in a professional activity that may require disclosing H&M confidential information,” which is the third prong of its “Conflict of Interest Policy”. The “employment” or “participating in a professional activity” that Gallant was engaged in was his internship and activities on behalf of a “workers coalition,” to quote Walters (GC Exh. 9), for which he discussed and advocated on behalf of workers’ rights under Fair Workweek and OSHA policies and regulations.<sup>30</sup> These activities, included, again quoting Walters, “reviewing staff schedules, legal postings, consistency of policies from store to store/employee to employee, store safety & even fielding

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right on point, there is another analytical framework applicable in this case which trumps *Lutheran Heritage*, as discussed below, and makes this theory a secondary one, if not moot.

<sup>28</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>29</sup> Where all the acts have been fully litigated, such as in this case, I am permitted to find a violation on a different theory than explicitly plead or advanced by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB 81, fn. 6 (2015), and cases cited therein; *Noel Canning*, 364 NLRB No. 45, slip op. at 5 (2016).

<sup>30</sup> See Hunter’s notes of the July 18 meeting (GC Exh. 2).

employee relation issues.”<sup>31</sup> It is evident that Respondent was concerned about what Gallant was doing, and more specifically about what he might be uncovering—and revealing—in the course of his activities on behalf of the “workers coalition” he was interning for.<sup>32</sup>

It is accordingly clear that the General Counsel met its initial burden under *Burnup & Sims* in establishing that Gallant was terminated for conduct he engaged in while in the course of engaging in protected activity. The burden then shifts to Respondent to show that it had a good faith belief that Gallant engaged in misconduct, a misconduct of the type that would forfeit the Act’s protection. It is here that Respondent’s case falls apart and crumbles to the ground. Respondent in essence accused Gallant of revealing or disclosing “confidential information,” an accusation that Gallant vehemently denied. More importantly, both Walters and Siantz admitted that Respondent never had any evidence whatsoever that Gallant had in fact revealed or disclosed any confidential information. Indeed, Respondent has never stated what “confidential information” Gallant had supposedly revealed—because it cannot, since there is no evidence that it ever happened.<sup>33</sup> This fatally undermines any defense that Respondent might claim that it had a “good faith” belief that Gallant engaged in misconduct. In that regard, it must be noted that under *Burnup & Sims*, employees engaged in conduct such as Gallant are the beneficiaries of a “heightened standard” of protection, which means that an employer’s mere suspicion or conjecture that an employee *may* have engaged in misconduct is inherently insufficient to meet the “good faith” requirement that misconduct took place. Such good faith must be based on reasonable, objective facts—not on suspicion or concern, otherwise the “heightened standard” of protection becomes meaningless.<sup>34</sup> Accordingly, I conclude that Respondent never satisfied the second prong of the shifting burden under *Burnup & Sims*, since it did not—and could not, under these facts—establish that it had a good faith belief that Gallant had engaged in misconduct, that is, breached its “Conflict of Interest” policy. Respondent therefore violated Section 8(a)(1) of the Act by discharging Gallant.

As briefly discussed above, there is a second viable theory under which Gallant’s discharge would also be unlawful. Thus, it would appear that Respondent applied and enforced its “Conflict of Interest” policy to suppress and punish Gallant’s protected activity. As such, Respondent’s application of this rule would satisfy the requirements under the third prong of *Lutheran Heritage*, supra., which as mentioned earlier was left untouched by *Boeing*. Accordingly, I conclude that Gallant’s discharge was also unlawful because an otherwise facially valid rule was applied to restrict the exercise of Section 7 rights.

### CONCLUSIONS OF LAW

1. Hennes & Mauritz, LP d/b/a H&M (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

<sup>31</sup> GC Exh. 9.

<sup>32</sup> This “workers coalition” was United for Respect, the Charging Party, the identity of which Gallant never revealed.

<sup>33</sup> In that regard, it is notable that Gallant’s termination notice speaks of his “potential” conflict of interest—not an actual one (Jt. Exh. 4).

<sup>34</sup> Indeed, to rule otherwise would place the General Counsel in an untenable position: having to prove a negative, that is, having to prove that something for which there is no evidence of it having occurred, did not, in fact, occur.



2. Respondent violated Section 8(a)(1) of the Act by creating the impression that its employees' protected activities is under surveillance; by interrogating employees regarding their protected activities and their reason for engaging in said activities; by informing employees not to speak to other employees about their working conditions; by telling employees to provide the identity of other employees with whom they had communicated with regarding their working conditions; by threatening unspecified reprisals for ostensibly violating its policies and tarnishing its reputation; by requiring employees to obtain written permission before engaging in protected activities; by requesting copies of surveys taken by employees in the course of engaging in protected activities; and by threatening adverse consequences if its employees chose the Union as their representative.

3. Respondent additionally violated Section 8(a)(1) of the Act by discharging its employee Nickolas Gallant on August 27, 2019, because he engaged in protected concerted activity, and by applying an otherwise valid work rule to restrict protected activity.

4. The unfair labor practices committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

The appropriate remedy for the Section 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from: creating the impression that its employees' protected activities is under surveillance; interrogating employees regarding their protected activities and their reason for engaging in said activities; informing employees not to speak to other employees about their working conditions; telling employees to provide the identity of other employees with whom they had communicated with regarding their working conditions; threatening unspecified reprisals for ostensibly violating its policies and tarnishing its reputation; requiring employees to obtain written permission before engaging in protected activities; requesting copies of surveys taken by employees in the course of engaging in protected activities; applying otherwise valid work rules to restrain protected activity; and discharging employees because they have engaged in protected concerted activity.

Respondent shall also cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondent unlawfully discharged Gallant, Respondent must offer him reinstatement to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall make Gallant whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93

(2016), the Respondent shall compensate him for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas* 5 *Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate him for the adverse tax consequences, if any, of receiving a lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the 10 Regional Director for Region 32 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful 15 termination of Gallant and to notify him in writing that this has been done and that his terminations will not be used against him in any way.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's Emeryville store (store No. 145) as well as store No. 80 and store No. 101 in San Francisco, or wherever the notices to employees are 20 regularly posted for 60 days without anything covering it up or defacing its contents.<sup>35</sup> In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 25 facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2019. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 32 of the Board what action it will take with respect to this decision.

30 Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>36</sup>

### ORDER

35 Respondent, Hennes & Mauritz, LP d/b/a H&M, Emeryville, California, its officers, agents, successors, and assigns, shall

<sup>35</sup> The General Counsel submits that Respondent should post Notices in stores Nos. 80 and 101 in San Francisco in addition to the store in Emeryville where Gallant worked, because Gallant engaged in protected concerted activity by interacting with the employees at those stores, which he visited on several occasions, and Gallant's discharge could reasonably be expected to have had a coercive impact on those employees. I agree; word travels fast on such circumstances.

<sup>36</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Engaging in any of the conduct described immediately above in the remedy section of this decision;

(b) In any other like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, if it has not already done so, offer Gallant full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gallant whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at store No. 145 in Emeryville, and Stores No. 80 and No. 101 in San Francisco, where notices to employees are customarily posted, copies of the attached notice marked “Appendix.”<sup>37</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

<sup>37</sup> If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2019.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. June 22, 2020



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Ariel L. Sotolongo  
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify employees that:

WE WILL NOT create the impression that their protected activities, such as speaking with other employees about hours, wages and working conditions, are under surveillance;

WE WILL NOT interrogate our employees about their protected activities such as by asking employees why they discussed working conditions with other employees or asking to reveal the nature of other employees' concerns, or the identity of those employees;

WE WILL NOT threaten our employees with adverse consequences or unspecified reprisals by informing them that they should not be discussing working conditions with other employees, or suggesting that they are not qualified to do so, or informing them that doing so tarnishes our reputation and our brand;

WE WILL NOT inform our employees that they require written permission before they engage in protected activity such as joining or requesting assistance from outside groups that advocate for employee rights;

WE WILL NOT demand that you provide us with copies of surveys you may have taken from other employees, customers or members of the public regarding wages, hours or working conditions;

WE WILL NOT, discharge you or otherwise discriminate against you because you have engaged in protected activities such as described above;

WE WILL NOT apply or enforce work rules to restrict you from engaging in protected activities such as described above;

WE WILL within 14 days from the date of the Board’s Order, offer Nickolas Gallant full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Nickolas Gallant whole for any loss of earnings and other benefits resulting from his termination, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Nickolas Gallant and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

HENNES & MAURITZ, LP D/B/A H&M

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: [www.nlrb.gov](http://www.nlrb.gov)

Oakland Federal Bldg., 1301 Clay Street, Room 300-N, Oakland, CA 94612-5224  
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge’s decision can be found at [www.nlrb.gov/case/32-CA-250461](http://www.nlrb.gov/case/32-CA-250461) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, (510) 671-3034.